R.D.# 0003-02
Hoboken, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

HOBOKEN ORGANIZATION AGAINST POVERTY AND ECONOMIC STRESS, INC.[1]
Employer-Petitioner

And **CASE 22-RM-734**

LOCAL 617, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC[2]
Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it

[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Union appears as amended at the hearing.
[3] Briefs filed by the parties have been fully considered.

will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization involved claims to represent certain employees of the Employer.[5]

4. As described fully below, the Board has held that "a petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition and the Board's decision issues on or after the 90th day preceding the expiration date of the contract." *Deluxe Metal Furniture Company,* 121 NLRB 995, 999 (1958). That is the situation here. Thus, as explained more fully below, I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act and an election should be directed.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **All teachers, teachers' assistants, health coordinators, health coordinator assistants, education coordinators, social service coordinators, education coordinator assistants, social service coordinator assistants, special needs aides, head cooks, cooks, bus drivers, maintenance employees, and head teachers employed by the Employer at its Hoboken facility, excluding the Executive Director, Program Director, Secretary, guards and supervisors as defined in the Act.[6]**

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[4] The Employer is engaged in the administration of a Head Start Program providing early childhood education and family support to children of low income qualifying families at its various Hoboken, New Jersey facilities, including its 301 Garden Street, Hoboken New Jersey facility (Hoboken facility), the only facility involved herein.

[5] The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[6] Neither the Employer nor the Petitioner contends that the approximately 130 temporary workers the Employer obtains from an outside agency should be included in the Unit. Cf. *Outokumpu Copper Franklin, Inc.,* 334 NLRB No. 39 (2001). There are approximately 21 employees in the unit.

I. Contentions of the Parties

The Union contends that there is a collective bargaining agreement in effect between itself and the Employer, thus barring a question concerning representation and requiring a dismissal of the petition. The Employer asserts that the collective bargaining agreement, if it exists, is oral and not in writing and, therefore, cannot serve as a bar to the processing of the instant petition.

I fully explore the parties' positions on these issues below. However, as noted above, I have also concluded that, regardless of the existence of a contract and its status as a bar, since a decision is issuing on or after the 90th day preceding the expiration date of the contract, the petition cannot be dismissed and an election will be directed.

II. Background

The record discloses that the Union was certified on September 28, 1992, in Case 22-RC-10660, as the exclusive collective bargaining agent for a unit of all teachers, teachers' assistants, health coordinators, health coordinator assistants, education coordinators, social service coordinators, education coordinator assistants, social service coordinator assistants, special needs aides, head cooks, cooks, bus drivers, maintenance employees, and head teachers employed by the Employer at its Hoboken facility, excluding the Executive Director, Program Director, Secretary, guards and supervisors as defined in the Act.

The record reveals that following the certification, the Employer and the Union entered into several written, succeeding collective bargaining agreements, including a written agreement effective from April 1, 1997 through March 31, 1999.

It is undisputed that the parties, thereafter, commenced collective bargaining negotiations pursuant to written ground rules that provided, inter alia, that the 1997-1999 collective bargaining agreement would remain in effect pending agreement on a successor collective bargaining agreement.[7] Subsequently, the parties exchanged a series of letters and documents, some of which were signed, memorializing their agreements on various amendments and additions to the collective bargaining agreement. The record reveals that by letter to the Union dated September 25, 2000, the Employer's Executive Director and chief negotiator, Ora Welch, acknowledged that the parties had reached a final successor collective bargaining agreement the previous Friday, September 22, 2000. The Union asserts that the above described exchange of letters and documents, many of them co-signed or initialed by Welch and the Union's Labor Relations Specialist/Consultant Lorraine Martin, its chief negotiator, amounts to a written agreement which bars the instant petition.[8]

It is undisputed that this successor collective bargaining agreement is effective from April 1, 1999 through March 31, 2002. The Employer-Petitioner filed its petition in this matter on May 11, 2001.[9] It is further undisputed that as of the date of the filing of the petition, this successor agreement had not been reduced to a self contained document signed by the parties, despite an agreement by them to do so.

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[7] These written ground rules were memorialized in a document dated May 1999 and signed by the parties.

[8] There are approximately 11 letters and documents that the Union contends comprise the totality of the agreed upon successor collective bargaining agreement.

[9] The processing of the petition was blocked by the filing of a charge in Case 22-CA-24544 by the Union on May 3, 2001. This charge was closed on December 12, 2001.

Further, there is no dispute that the terms and conditions of this successor agreement have been adhered to, including the wage increases provided therein.

III. Board's Contract Bar Policy

The Board's contract bar rules are clear. To serve as a bar to an election, a contract must meet certain basic requirements; these requirements are set out in the Board's decision in *Appalachian Shale Products Co.,* 121 NLRB 1160 (1958). In this regard, a contract must be reduced to writing and executed by the parties; it must also be clearly identifiable as a controlling document and contain substantial terms and conditions of employment. The Board in *Appalachian Shale Products Co.,* above, recognized that contracts may on occasion be contained in informal documents and are sometimes arrived at by an exchange of signed documents. See also *Diversified Services, Inc.*, 225 NLRB 1092 (1976)*; United Telephone Co.,* 179 NLRB 732 (1969). The Board has also held that an oral agreement does not constitute a bar. *Empire Screen Printing,* 249 NLRB 718 (1980); *Sullivan & Sons Mgf. Corp.,* 105 NLRB 549 (1953).

The primary objective of the Board's contract bar policy is to achieve a reasonable balance between the often conflicting goals of industrial stability, on the one hand, and freedom of employees' choice, on the other. The policy is intended to afford the contracting parties and the employees a period of stability in their relationship, without interruption, and at the same time provide employees the opportunity, at reasonable times, to change or eliminate their bargaining representative if they wish. *Hexton Furniture Co.,* 111 NLRB 342 (1955); *Appalachian Shale Products Co.,* above at 1163.

IV. Analysis of Instant Case

A. Contract, Whether Written or Oral, Can Be a Bar

The Board, in *Montgomery Ward & Co., Incorporated,* 137 NLRB 346, 347 (1962) held that where, as here, the incumbent union is the certified collective bargaining representative, a current contract will act as a bar to a petition filed by either contracting party during the entire term of the contract. In such circumstances, the Board explained that there is no valid rationale for conducting an election in disregard of the agreement of the parties. The Board stated that "…we cannot interpret our contract-bar rules in such a way as to permit employers or certified unions to take advantage of whatever benefits may accrue from the contract with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election." *Montgomery Ward & Co., Incorporated,* above at 348, 349.

Thus, an agreement in existence between the parties, even if oral, will bar a petition filed by a contacting party to that agreement. *Montgomery Ward & Co., Incorporated,* supra; *Building and Construction Trades Council of Ventura County*, 147 NLRB 1464, 1483-1484 (1964); *Northern Pacific Sealcoating, Inc.*, 309 NLRB 759 (1992); *St. Elizabeth Manor, Inc*., 329 NLRB 341, 344 at fn. 10 (1999); cf. *River Forest Golden Bear*, 218 NLRB 1074 (1975). To hold otherwise would be to sanction the undoing of the terms of a bargain which the parties themselves struck, a result that would be contrary to the statutory policy which values stabilizing collective bargaining relationships. In this regard, the Board has held that it will not permit parties to use its processes in a manner contrary to their contractual commitments and

obligations. *Montgomery Ward & Co., Incorporated,* supra; *Northern Pacific Sealcoating, Inc.*, supra.

B. Timeliness of Petition

The petition was filed by the Employer on May 11, 2001 and is therefore not timely with respect to either the open period for filing petitions or after expiration of the contract. Thus, the petition was untimely when filed.[10]

The Employer, in its post hearing brief, argues that since the successor collective bargaining agreement is set to expire by its terms on March 31, 2002, the Board should exercise its discretion and order an election despite a finding that the petition may have been untimely filed. I find merit in the Employer-Petitioner's contention. In this regard, the Board has held that "a petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition and the Board's decision issues on or after the 90th day preceding the expiration date of the contract." *Deluxe Metal Furniture Company,* 121 NLRB 995, 999 (1958); *Royal Crown Cola Bottling Co.,* 150 NLRB 1624, 1625 (1965); *Westclox Division of General Time Corp.*, 195 NLRB 1107 (1972); *The Mosler Safe Company*, 216 NLRB 9, 10 (1974); *Maramount Corp.*, 310 NLRB 508, 512 (1993).[11] This is the situation here. Accordingly, it is appropriate to direct an election in this matter.

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[10] A petition is timely filed if it is filed not more than 90 days nor less than 60 days prior to the terminal date of the contract or after the contract's termination date. *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962). *General Cable Corporation*, 139 NLRB 1123, 1125 (1962).

[11] Such a hearing on an otherwise premature petition will only be directed, as here, if an investigation conducted on the basis of information furnished by the Petitioner establishes reasonable grounds for believing that the existing contract is not a bar. *Deluxe Metal Furniture Company,* above at 999.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by **Local 617, Service Employees International Union, AFL-CIO-CLC.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used

to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility,* 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before March 19, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operates to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by March 26, 2002.

Signed at Newark, New Jersey this 12th day of March 2002.

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Gary T. Kendellen, Regional Director
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